OFFENSES INVOLVING WEAPONS AND EXPLOSIVES
Revised September 2016

Table of Contents

A EXPLOSIVES

1. Misconduct Involving Explosives

Under A.R.S. § 13-3103(A), a person commits misconduct involving explosives by knowingly:

1. Keeping or storing a greater quantity than fifty pounds of explosives in or upon any building or premises within a distance of one-half mile of the exterior limits of a city or town, except in vessels, railroad cars or vehicles receiving and keeping them in the course of and for the purpose of transportation; or

2. Keeping or storing percussion caps or any blasting powder within two hundred feet of a building or premises where explosives are kept or stored; or

3. Selling, transporting or possessing explosives without having plainly marked, in a conspicuous place on the box or package containing the explosive, its name, explosive character and date of manufacture.

Misconduct involving explosives is a class 1 misdemeanor. A.R.S. § 13-3103(B).

“Explosive” means any dynamite, nitroglycerine, black powder, or other similar explosive material, including plastic explosives. Explosive does not include ammunition or ammunition components such as primers, percussion caps, smokeless powder, black powder and black powder substitutes used for hand loading purposes. A.R.S. § 13-3101(3).

i. Exceptions

This statute does not apply to anyone who legally keeps, stores or transports explosives, percussion caps or blasting powder as a part of their business. A.R.S. § 13-3103(A)(4).

2. Depositing Explosives

A person commits depositing explosives if, with intent to physically endanger, injure, intimidate or terrify any person, such person knowingly deposits any explosive on, in or near any vehicle, building or place where persons inhabit, frequent or assemble. Depositing explosives is a class 4 felony. A.R.S. § 13-3104(A), (B).

The predecessor statute making it a felony to deposit or attempt to explode any explosive device in or near any building did not require actual detonation of the device, not did it require the State to prove the device, in its exact physical condition as planted, was capable of detonation. *State v. Van Arsdale*, 20 Ariz. App. 253, 254-55 (1973).

3. Misconduct Involving Simulated Explosive Device

A person commits misconduct involving simulated explosive devices by intentionally giving or sending to another person or placing in a private or public place a simulated explosive device with the intent to terrify, intimidate, threaten or harass. A.R.S. § 13-3110(A). This offense is a class 5 felony. A.R.S. § 13-3110(C). Placing or sending a simulated explosive device without an attached, conspicuous written notice that the device has been rendered inert and is possessed for the purpose of curio or relic collection, display or other similar purpose, is prima facie evidence of intent to terrify, intimidate, threaten or harass. A.R.S. § 13-3110(B).

A.R.S. § 13-3110(D) provides that "simulated explosive device" means a simulation of a prohibited weapon described in:

- A.R.S. § 13-3101(A)(8)(a)(i)(bomb, grenade, rocket having a propellant charge of more than four ounces or mine and that is explosive, incendiary or poison gas);

- A.R.S. § 13-3101(A)(8)(a)(vi)(breakable container containing a flammable liquid with a flash point of 150 degrees Fahrenheit or less and having a wick or similar device capable of being ignited);
- or A.R.S. § 13-3101(A)(8)(a)(viii)(improvised explosive device)

that a reasonable person would believe is such a prohibited weapon.

B. UNLAWFUL DISCHARGE OF FIREARMS

A person who with criminal negligence discharges a firearm within or into the limits of any municipality is guilty of a class 6 felony. A.R.S. § 13-3107(A). (See Mens Rea, AZ Brief-Revised, for definition of criminal negligence.) Bodily harm is not required to convict for firing a gun within city limits. *State v. Andrews*, 106 Ariz. 372, 377 (1970). Even though this offense involves the discharge of a deadly weapon, it may be designated a misdemeanor under § 13-604 unless a dangerous offense is alleged and proven pursuant to § 13-704(L)(dangerous offenders). A.R.S. § 13-3107(B).

1. Exceptions

Under A.R.S. § 13-3107(C), this statute does not apply if the firearm is discharged:

1. As allowed under chapter 4 of Title 13 (justification defenses).

2. On a properly supervised range.

3. To lawfully take wildlife during an open season established by the Arizona game and fish and game, and subject to the limitations under title 17 and Arizona game and fish rules and orders.

- But, this paragraph does not prevent a city, town or county from adopting an ordinance or rule restricting the discharge of a firearm within a quarter

mile of an occupied structure without the consent of the owner or occupant of the structure. For the purposes of this paragraph:

- (a) “Occupied structure” means any building in which, at the time of the firearm's discharge, a reasonable person from the location where a firearm is discharged would expect a person to be present.
- (b) “Take” has the same meaning prescribed in § 17-101.

4. For the control of nuisance wildlife by permit from the Arizona game and fish department or the United States fish and wildlife service.

5. By special permit of the chief of police of the municipality.

6. As required by an animal control officer in the performance of duties as specified in § 9-499.04.

7. Using blanks.

8. More than one mile from any occupied structure as defined in § 13-3101.

9. In self-defense or defense of another person against an animal attack if a reasonable person would believe that deadly physical force against the animal is immediately necessary and reasonable under the circumstances to protect oneself or the other person.

A.R.S. § 13-3107(D) provides that for purposes of this statute:

1. “Municipality” means any city or town and includes any property that is fully enclosed within the city or town.

2. “Properly supervised range” means a range that is any of the following:

- (a) Operated by a club affiliated with the NRA, the amateur trapshooting association, the national skeet association or any other nationally recognized shooting organization, or by any public or private school.
- (b) Approved by any agency of the federal government, this state or a county or city within which the range is located.

- (c) Operated with adult supervision for shooting air or carbon dioxide gas operated guns, or for shooting in underground ranges on private or public property.

C. SALE OR GIFT OF FIREARM TO MINOR

Under A.R.S. § 13-3109(A), it is a class 6 felony to sell or give a minor a firearm, ammunition or toy pistol by which dangerous and explosive substances may be discharged, without the written consent of the minor's parent or legal guardian

However, temporary transfer of firearms and ammunition by firearms safety instructors, hunter safety instructors, competition coaches or their assistants are permitted, if the minor's parent or guardian has given consent for the minor to participate in activities such as firearms or hunting safety courses, firearms competition or training. With the consent of the minor's parent or guardian, the temporary transfer of firearms and ammunition by an adult who is accompanying minors engaged in hunting or formal or informal target shooting activities are permitted for those purposes. A.R.S. § 13-3109(A)(C).

This statute shall not be construed to require reporting sales of firearms, nor shall registration of firearms or firearms sales be required. A.R.S. § 13-3109(B).

Air rifles, air pistols and BB guns do not come within prohibitions of this section making it offense to give or sell to a minor under 18, without consent of parent or guardian, a firearm, a munition, or toy pistol by which dangerous and explosive substances may be discharged, since they are not firearms or pistols, toy or otherwise, by which dangerous and explosive substances could be discharged. Op.Atty.Gen. No. 62-8. However, beware that some pellet guns qualify as firearms. In *State v. Cisz*, 1 CA-CR 11-0244, 2011 WL 5964518, ¶¶ 17, 18 (App. 2011) – note, this is a memorandum

decision and **NOT** citable – Division One addressed the discrepancy in the definitions of the term "firearm" under § 13-105(19) and § 13-3101(A)(4) for purposes of deciding whether the defendant violated a probation condition that she not possess or control firearms or weapons "as defined under § 13-3101." The Court noted assuming *arguendo* that a pellet gun does not expel a projectile by means of an explosive as that term is defined in A.R.S. § 13–3101(A)(3), if the definition of a firearm is restricted to that provided in A.R.S. § 13–3101(A)(4), a pellet gun would not qualify as a firearm. *But see* Commonwealth v. Sterling, 496 A.2d 789, 792 (Pa.Super.Ct.1985)(holding that a carbon dioxide (“CO2”) pellet gun is a firearm under the Pennsylvania sentencing code because “[a] carbon dioxide powered gun expels a projectile by the action of an explosive or the expansion of gas”). However, under A.R.S. § 13–105(19), a pellet gun may qualify as a firearm. *See State v. Cordova*, 198 Ariz. 242, 243, ¶ 5 (App. 1999)(relying on § 13-105 to hold that a pellet gun that used CO2 cartridges to propel the pellets was a firearm, and thus a deadly weapon).

D. MINOR POSSESSION OF FIREARMS

An unemancipated minor who is unaccompanied by a parent, grandparent or guardian, or a certified hunter safety instructor or certified firearms safety instructor acting with the consent of the unemancipated person's parent or guardian, may not knowingly carry or possess on his person, within his immediate control, or in or on a means of transportation a firearm in any place that is open to the public or on any street or highway or on any private property, except private property owned or leased by the minor or the minor's parent, grandparent or guardian. A.R.S. § 13-3111(A). See exceptions, below.) This offense is a class 6 felony. A.R.S. § 13-3111(H). This statute

previously applied only to counties with a population of over 500,000; this was held to be an unconstitutional special or local law. *In re Marxus B.*, 199 Ariz. 11, 14, ¶ 15 (App. 2000).

This statute is supplemental to any other law imposing a criminal penalty for the use or exhibition of a deadly weapon. A minor who violates this section may be prosecuted and adjudicated delinquent for any other criminal conduct involving the use or exhibition of the deadly weapon. A.R.S. § 13-3111(G). In addition to any other penalty provided by law, a person who violates this statute is subject to the following penalties:

> 1. If adjudicated a delinquent juvenile for an offense involving an unloaded firearm, a fine of not more than $250, and the court may order the suspension or revocation of the person's driver license until the person reaches 18 years. If the person does not have a driver license at the time of the adjudication, the court may direct that the department of transportation not issue a driver license to the person until the person reaches 18 years.
>
> 2. If adjudicated a delinquent juvenile for an offense involving a loaded firearm, a fine of not more than $500, and the court may order the suspension or revocation of the person's driver license until the person reaches 18 years. If the person does not have a driver license at the time of the adjudication, the court may direct that the department of transportation not issue a driver license to the person until the person reaches 18 years.
>
> 3. If adjudicated a delinquent juvenile for an offense involving a loaded or unloaded firearm, if the person possessed the firearm while the person was the driver or an occupant of a motor vehicle, a fine of not more than $500 and the court shall order the suspension or revocation of the person's driver license until the person reaches 18. If the person does not have a driver license at the time of adjudication, the court shall direct that the department of transportation not issue a driver license to the person until the person reaches 18 years. If the court finds that no other means of transportation is available, the driving privileges of the child may be restricted to travel between the child's home, school and place of

> employment during specified periods of time according to the child's school and employment schedule.

A.R.S. § 13-3111(D). If the court finds the parent or guardian knew or reasonably should have known of the minor's unlawful conduct and made no effort to prohibit it, the parent or guardian is jointly and severally responsible for any fine imposed pursuant to this section or for any civil actual damages resulting from the unlawful use of the firearm by the minor. A.R.S. § 13-3111(F).

1. Exceptions

Under A.R.S. § 13-3111(B), this statute does not apply to a person who is 14, 15, 16, or 17 years and:

1. Engaged in lawful hunting or shooting events or marksmanship practice at established ranges or other areas where the discharge of a firearm is not prohibited.

2. Engaged in lawful transportation of an unloaded firearm for the purpose of lawful hunting.

3. Engaged in lawful transportation of an unloaded firearm between the hours of 5:00 a.m. and 10:00 p.m. for the purpose of shooting events or marksmanship practice at established ranges or other areas where the discharge of a firearm is not prohibited.

4. Engaged in activities requiring the use of a firearm related to the production of crops, livestock, poultry, livestock products, poultry products, or ratites or in the production or storage of agricultural commodities.

If the minor is not exempt under subsection B(1)-(4) above and is in possession of a firearm, a peace officer must seize the firearm at the time the violation occurs. A.R.S. § 13-3111(C). Such firearms must be held by the law enforcement agency

responsible for the seizure until the charges have been adjudicated or disposed of otherwise, or the person is convicted. Upon adjudication or conviction of a person for a violation of this section, the court must order the firearm forfeited. However, the law enforcement agency shall return the firearm to the lawful owner if the identity of that person is known. A.R.S. § 13-3111(E).

2. Burden of Proof

The State is not required to prove that a gun was not permanently inoperable at the time it was removed from a juvenile to prove all elements of the offense of possession of a firearm by a minor. Rather, the burden remains on the juvenile to come forward with evidence establishing a reasonable doubt as to the operability of the firearm. Likewise, by excepting from the offense of possession of a firearm by a minor such activities as lawful hunting or shooting events, the legislature did not intend failure to engage in such activities to be an element of the offense. *In re Roy L.*, 197 Ariz. 441, 446-47 ¶¶ 18-19 (App. 2000).

E. MISCONDUCT INVOLVING BODY ARMOR

A person commits misconduct involving body armor by knowingly wearing or otherwise using body armor during the commission of any felony offense. This offense is a class 4 felony. A.R.S. § 13-3116(A), (B). “Body armor” means any clothing or equipment designed in whole or in part to minimize the risk of injury from a deadly weapon. A.R.S. § 13-3116(C).

Conspiracy can be the underlying felony supporting a conviction for misconduct with body armor based on the wearing of body armor during the commission of a felony offense. *State v. Tucker*, 231 Ariz. 125, 139-140, ¶¶ 33-35 (App. 2012).

1. Nexus between Underlying Felony and Body Armor

A.R.S. § 13-3116 is similar to possession of a weapon during a felony offense under § 13–3102(A)(8), and thus implies some relationship between the use of body armor and the commission of the offense. *State v. Tucker*, 231 Ariz. 125, 141, ¶ 37 (App. 2012), citing *State v. Petrak,* 198 Ariz. 260, ¶ 19 (App. 2000). In *Tucker*, the court held assuming *arguendo* there must be a nexus between the use of the body armor and the commission of the underlying felony and that the defendant must have "intended to use or could have used" the body armor "to further the felony" of conspiracy, the evidence at trial established that nexus; the defendant wore the armor at the staging area where his coconspirators had agreed to meet immediately before committing the home invasion offenses that were the subject of the conspiracy, and the coconspirators had requested the vests and automatic weapons in order to successfully execute the objectives of the conspiracy. *Tucker*, 231 Ariz. at 140-41, ¶¶ 36-38.

F. REMOTE STUN GUNS

It is unlawful for a person or entity to sell an authorized remote stun gun without keeping an accurate sales record as to the identity of the purchaser with the manufacturer of the authorized remote stun gun. The identification that is required by this paragraph must be verified with a government-issued identification. This requirement does not apply to secondary sales. A.R.S. § 13-3117(A)(1). Violation of this section is a petty offense. A.R.S. § 13-3117(D).

It is unlawful for a person or entity to knowingly use or threaten to use a remote stun gun or an authorized remote stun gun against a law enforcement officer who is

engaged in the performance of the officer's official duties. A.R.S. § 13-3117(A)(2). Violation of this section is a class 4 felony. A.R.S. § 13-3117(D).

Under A.R.S. § 13-3117(E)(1), “Authorized remote stun gun” means a remote stun gun that has all of the following: (a) an electrical discharge that is less than one hundred thousand volts and less than nine joules of energy per pulse; (b) a serial or identification number on all projectiles that are discharged from the remote stun gun; (c) an identification and tracking system that, on deployment of remote electrodes, disperses coded material that is traceable to the purchaser through records that are kept by the manufacturer on all remote stun guns and all individual cartridges sold; and (d) a training program that is offered by the manufacturer. Under A.R.S. § 13-3117(E)(2), “remote stun gun” means an electronic device that emits an electrical charge and that is designed and primarily employed to incapacitate a person or animal either through contact with electrodes on the device itself or remotely through wired probes that are attached to the device or through a spark, plasma, ionization or other conductive means emitting from the device.

Under A.R.S. § 13-3117(B), this statute does not (1) preclude the prosecution of any person for the use of a remote stun gun or an authorized remote stun gun during the commission of any criminal offense; or (2) preclude any justification defense under chapter 4 of title 13. The regulation of remote stun guns and authorized remote stun guns is a matter of statewide concern. A.R.S. § 13-3117(C).

G. WEAPONS MISCONDUCT IN SECURED AREA OF AIRPORT

A person commits misconduct involving weapons by intentionally carrying, possessing or exercising control over a deadly weapon in a secured area of an airport.

A.R.S. § 13-3119(A). This offense is s class 1 misdemeanor. A.R.S. § 13-3119(C). "Deadly weapon" has the same meaning prescribed in § 13-105. A.R.S. § 13-3119(D)(1). "Secured area of an airport" means any area of an airport specified in an airport security program that is authorized and approved by the United States transportation security administration pursuant to 49 United States Code § 44903(h)(7)(F) and defined in 49 Code of Federal Regulations § 1540.5. A.R.S. § 13-3119(D)(2).

Under A.R.S. § 13-3119(B), this statute does not apply to:

1. A peace officer or a federally sworn officer while in the actual performance of the officer's duties.

2. A member of the military forces of the United States or of any state of the United States in the actual performance of the member's official duties.

3. An individual who is authorized by a federal agency in the actual performance of the individual's official duties.

4. General aviation areas not included in the security identification display area or sterile area as defined in the airport security program approved by the transportation security administration.

5. The lawful transportation of deadly weapons in accordance with state and federal law.

H. ARMED ROBBERY: SIMULATED DEADLY WEAPON

A.R.S. § 13-1904(A) provides that a person commits armed robbery if, in the course of committing robbery as defined in § 13-1902, such person or an accomplice: (1) is armed with a deadly weapon or a simulated deadly weapon; or (2) uses or

threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon. This offense is a class 2 felony. A.R.S. § 13-1904(B). (See AZ Briefs – Revised, Deadly Weapons and Dangerous Instruments, for definition of "deadly weapon," "firearm," and constructive/joint possession of a firearm.)

Armed robbery is a "violent offense" even if based on a simulated weapon. *McGuire v. Lee*, 239 Ariz. 384, ¶¶ 19, 20 (App. 2016)(juvenile charged with armed robbery involving the use of a simulated deadly weapon, a toy gun, was subject to mandatory prosecution as an adult).

The use of a nasal inhaler to simulate the barrel of a gun pressed against the victim's body constitutes simulated deadly weapon. *State v. Felix,* 153 Ariz. 417, 419 (App.1986). A simulated deadly weapon is an alternative to a deadly weapon; in other words, the “simulation” is not that a robber feigns or pretends to have a weapon on their person but rather that the person commits the robbery with a pretend deadly weapon. The weapon, whether an actual deadly weapon, a dangerous instrument, or a simulated deadly weapon, must actually be present and used in a threatening manner to satisfy the “threatens to use” element of the armed robbery statute. A mere verbal threat to use a deadly weapon, unaccompanied by the actual presence of a deadly weapon, dangerous instrument or simulated deadly weapon, does not satisfy the statutory requirement for a charge of armed robbery. *State v. Garza Rodriguez*, 164 Ariz. 107, 112, 791 P.2d 633, 638 (1990). In *Garza Rodriguez,* the supreme court found the defendant did not commit armed robbery when she simply hid one hand behind her back and threatened to shoot the victim, or in a second incident when she simply told

the victim that she had a gun and moved her hands back and forth under her serape when the victim demanded to see the gun. *Id.* at 108.

However, in *State v. Ellison*, 169 Ariz. 424, 426-427 (App. 1991) the court of appeals held evidence that the defendant and his accomplice simulated deadly weapons using a combination of their hands and clothing was sufficient to meet simulated deadly weapon element of crime of armed robbery. The court noted the supreme court did not define “pretend deadly weapon” to exclude a part of a defendant's body. There, the defendant and his accomplice did more than simply imply that they had guns; they committed the robberies by positioning their hands to make their hands appear as if they instead were deadly weapons. The court held this was factually more like *Felix* than *Garza.* As noted by the supreme court in *Garza*, the victim's perception is the same whether the weapon appears to be or is in fact real; the perpetrator has created a life endangering environment with the same potential for increased danger to, or sudden and violent reaction by, the victim or bystanders. *State v. Ellison*, 169 Ariz. 424, 426–27 (App. 1991), *quoting Garza*.

The supreme court later clarified that unarmed defendants who, in course of a robbery, held their hands under their clothing in such a way that it appeared they had handguns under their shirts or in their pockets, could be convicted of armed robbery on a simulated deadly weapon theory. *State v. Bousley*, 171 Ariz. 166, 167 (1992). The defendants “did more than simply imply that they had guns; they positioned their hands under their clothing in such a way that they appeared to have deadly weapons -- guns.” Thus, "simulated deadly weapons were actually present.” *Id*. The court noted the crucial fact in *Garza* was that nothing resembling a weapon was actually present; the

defendant simply implied that she had a gun when she threatened to "shoot the smile off the cashier's face." But in *Bousley* the defendants did more than simply imply that they had guns; they positioned their hands under their clothing in such a way that they appeared to have deadly weapons-guns. Therefore, simulated deadly weapons were actually present.

I. DRIVE-BY SHOOTING

A person commits drive by shooting by intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle, or an occupied structure. A.R.S. § 13-1209(A). This crime is a class 2 felony. A.R.S. § 13-1209(D).

Motor vehicles used to commit this crime are subject to forfeiture. A.R.S. § 13-1209(B). Additionally, the court must order the person convicted for this offense to surrender his or her driver's license; upon surrender, the court must invalidate or destroy the license and forward the abstract of conviction to the department of transportation with an order of the court revoking the driving privilege for a period of at least one year but not more than five years. On receipt of the abstract of conviction and order, the department of transportation must revoke the driving privilege of the person for the period of time ordered by the judge. .A.R.S. § 13-1209(D).

Under A.R.S. § 13-1209(E)(1), “motor vehicle” has the same meaning prescribed in § 28-101. Under § 28-101(37)(a), "motor vehicle" means either: (i) a self-propelled vehicle, or (ii) a vehicle that is operated on the highways of this state and is propelled by the use of motor vehicle fuel. Under § 28-101(37(b), "motor vehicle" does not mean a motorized wheelchair, an electric personal assistive mobility device or a motorized skateboard; (i) "motorized skateboard" means a self-propelled device that has a motor,

a deck on which a person may ride and at east two tandem wheels in contact with the ground, and (ii) "motorized wheelchair" means a self-propelled wheelchair that is used by a person for mobility.

Under A.R.S. § 13-1209(E)(2), “occupied structure” has the same meaning prescribed in § 13-3101. Under § 13-3101(6), "occupied structure" means any building, object, vehicle, watercraft, aircraft, or places with sides and a floor that is separately securable from any other structure attached to it, that is used for lodging, business, transportation, recreation or storage and in which one or more human beings either are or are likely to be present or so near as to be in equivalent danger at the time the discharge of a firearm occurs. Occupied structure includes any dwelling house, whether occupied, unoccupied, or vacant.

To convict the defendant of drive-by shooting at a person, the State must prove he intentionally discharged his weapon at the victim identified in the charging document. *State v. Rivera*, 226 Ariz. 325, 328, ¶ 4 (App. 2011). Even a driver who fires no weapon can be found guilty as an accomplice to drive-by shooting. *State v. Lewis*, 222 Ariz. 321, 325, ¶ 10, n. 5 (App. 2009). The doctrine of transferred intent does not apply to the offense of drive-by shooting, because drive-by shooting does not require intentionally causing a particular result as an element of the offense. *State v. Siner*, 205 Ariz. 301, 304, ¶ 16 (App. 2003).

Endangerment is not a necessarily-included offense of drive by shooting. Under § 13-1209, a person could commit drive-by shooting by intentionally firing a weapon from a motor vehicle at an unoccupied or vacant house located miles from any other structure or person; however, a person commits endangerment only by recklessly

endangering *another person* with a substantial risk of imminent death or physical injury. Because shots fired from a motor vehicle at an unoccupied or vacant structure need not necessarily endanger another person, endangerment is not, by its nature, always a lesser-included offense of drive-by shooting. *State v. Hoover*, 195 Ariz. 186, 188, ¶ 12 (App. 1998). But if the charging document describes the offense of endangerment – as, for example, by specifying the fact that a person was present in the structure at which the defendant fired, or that the defendant fired at a person – endangerment may be a lesser-included offense under the facts of the particular case. *Id.* at ¶ 11.

Because disorderly conduct under § 13-2904(A)(6) requires proof of an element, that the defendant intend or know that his conduct will disturb someone's peace and quiet, not found in drive by shooting under § 13-1209, disorderly conduct is not a necessarily-included offense of drive by shooting. *State v. Cisneroz*, 190 Ariz. 315, 317 (App. 1997).

See also firing at an occupied structure under A.R.S. § 13-3102(A)(9): "A person commits misconduct involving weapons by knowingly discharging a firearm at an occupied structure in order to assist, promote or further the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise." (See Az Brief – Revised, Misconduct Involving Weapons, pp. 19-21.)

J. DISORDERLY CONDUCT

A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person recklessly handles, displays or discharges a deadly weapon or dangerous instrument. This crime is a class felony. A.R.S. § 13-2904(A)(6), (B).

A person convicted of disorderly conduct involving reckless handling, display, or discharge of a deadly weapon or dangerous instrument is ineligible under for misdemeanor designation under § 13-604. *State v. Garcia*, 219 Ariz. 104, 107, ¶ 13 (App. 2008). In *Garcia*, the court interpreted the language in former § 13-702(G), "involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument" as meaning that two categories of class 6 felonies are ineligible under A.R.S. § 13–702(G) for misdemeanor designation: (1) those that involve "the intentional or knowing infliction of serious physical injury" and (2) those that involve "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument" regardless of whether committed intentionally or knowingly. However, that statute was replaced by A.R.S. § 13-604, which uses the language "not involving a dangerous offense." "Dangerous offense" is defined by § 13-105(13) as "an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person."

A person cannot place a victim in reasonable apprehension of imminent physical injury without also disturbing the victim's peace. Thus, disorderly conduct against a person by recklessly handling a firearm is a lesser-included offense of aggravated assault with a deadly weapon. The distinguishing element is the intent to place the victim in reasonable apprehension of imminent physical injury. *State v. Burdick*, 211 Ariz. 583, 585-86, ¶ 9 (App. 2005), citing *State v. Miranda,* 200 Ariz. 67, 68, ¶ 5 (2001)(all elements of disorderly conduct by reckless display of a firearm under § 13-2904(A)(6) are in fact elements of aggravated assault under § 13-2904(A)(2), and

disorderly conduct instructions are thus appropriate in aggravated assault cases if the facts support both instructions).

Disorderly conduct by recklessly displaying or handling a firearm is a lesser-included offense of aggravated assault where the defendant confronted victims with a gun while acting as a bail recovery agent searching for a fugitive. In addition, assault is a lesser-included offense of aggravated assault where the jury could have determined that the distinguishing element between assault and aggravated assault, the use or threatened use of a deadly weapon, was not present. *State v. Erivez*, 236 Ariz. 472, 475, ¶ 15, (App. 2015). But, although disorderly conduct and assault are lesser-included offenses of the aggravated assault charge, neither offense is a lesser-included offense of the other. Disorderly conduct is not a lesser-included offense of assault because it requires the reckless display/handling of a firearm, an additional element not required for assault. Additionally, assault is not a lesser-included offense of disorderly conduct because intending to "disturb the peace or quiet" does not necessarily rise to the level of placing the victim in reasonable apprehension of immediate physical injury. Because disorderly conduct and assault are independent lesser-included offenses, and assault is not a lesser-included offense of disorderly conduct, the jury was not required to consider the charge of disorderly conduct before it could consider assault. *State v. Erivez*, 236 Ariz. 472, 476, ¶¶ 17-19, (App. 2015).

Although disorderly conduct is a lesser-included offense of aggravated assault charged under § 13-1203(A)(2)(intent to place victim in reasonable apprehension of imminent physical injury), it is not a lesser-included offense of aggravated assault under § 13-1203(A)(1)(intentionally, knowingly, *or recklessly* causing any physical injury to

another person). A person is guilty of aggravated assault under (A)(1) by recklessly causing physical injury to another; in this circumstance, the defendant need not intend to disturb the other person. Because intent to disturb is an essential element of disorderly conduct, a person can commit aggravated assault under (A)(1) without committing disorderly conduct. As such, disorderly conduct under § 13-2904(A)(6) is not a lesser-included offense of aggravated assault § 13-1203(A)(1). *State v. Foster*, 191 Ariz. 355, 357, ¶¶ 9-10 (App. 1998).

Where the undisputed evidence showed the victim was in apprehension of imminent physical injury and it was not possible that the jury could have found the victim was only disturbed, defendant was guilty of aggravated assault or nothing and not entitled to a lesser-included offense instruction on disorderly conduct. *State v. Lara*, 183 Ariz. 233, 234 (1995).